Supreme Court, U.S.
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No. 01-1181

In The

# Supreme Court of the United States

SHARON GERNETZKE, *et al.*,

*Petitioners,*

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## PARTIES TO THE PROCEEDING

Petitioners Sharon Gernetzke and Joseph Bezotte, by and through his parent and guardian, Doreen Bezotte, were, at all times relevant, students at George N. Tremper High School in Kenosha, Wisconsin and members of a student Bible Club. Sharon Gernetkze graduated in June of 2000.

Dr. Michael Johnson and Dr. Chester Pulaski were defendants in the proceedings below. Petitioners' claims against Johnson and Pulaski were dismissed by the District Court as redundant claims against Kenosha Unified School District No. 1 and their dismissal has not been challenged on appeal. Although Drs. Johnson and Pulaski remain identified in the caption as respondents, technically, they are not. The sole respondent before this Court is Kenosha Unified School District No. 1 ("the District").

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## STATEMENT OF THE CASE

The United States District Court for the Eastern District of Wisconsin accurately set forth the pertinent facts in this case. Pet. App. B, at 12a-20a. These findings of fact were not disputed on appeal.

### I. CLARIFICATION OF RECORD

The "facts" recited in the Petition bear modest resemblance to the record facts below. Petitioners make a number of assertions in their Statement of the Case that are either incomplete, incorrect or mischaracterize the record.

For example, Petitioners assert that Pulaski (the principal at Tremper High School) designated walls at the school for student murals in "1998." Pet. at 1. Contrarily, this designation was made "four or five" years prior to 2000 (i.e. 1995 or 1996). Further, Petitioners suggest that they received permission to paint a mural prior to designing their mural in 1998-99. Pet. at 1. Actually, the Bible Club designed the mural *before* its submission to Pulaski for approval.

In referring to Pulaski's decision to deny the inclusion of a large cross on the Bible Club mural (Pet. at 2) Petitioners fail to state *all* of the reasons why he made this decision, including his concerns that the permanent affixation of a large cross on Tremper's wall, an admitted Christian symbol, would: (1) violate the Establishment Clause, promote Christianity and possibly expose the District to litigation and create controversy in the school; (2) cause disruption in the school; and (3) require equal access on the wall to other controversial expressions including those of a Satanic or Nazi nature which would

further create disruption in the school and possibly threaten the safety of the school and Bible Club members. Pulaski approved the design except the inclusion of the cross. *See* Pet. App. B, at 14a-15a.

Petitioners also assert that in the fall of 1999, Sharon Gernetzke asked Pulaski if she could "distribute religious literature on campus to willing recipients during non-instructional time." Pet. at 2. The latter assertion is false. In the fall of 1999, Sharon Gernetzke asked Pulaski if she could distribute religious literature at Tremper, but she did not indicate that she wanted to distribute them to "willing recipients during non-instructional time." Further, Gernetzke did not show Pulaski a copy of the proposed literature and, in fact, he had no specific information as to its contents or appearance. *See* Pet. App. B, at 17a.

Petitioners also assert that Pulaski denied her request "*largely* because the literature was religious." Pet. at 2 (emphasis added). This is a mischaracterization of the record. Pulaski denied Gernetzke's request for several reasons including the fact it was an "individual" rather than a student organization-related request and it was religious.

It was Pulaski's practice to prohibit individual distribution of literature, publications, pamphlets, etc. on Tremper grounds irrespective of whether it was secular or religious literature. On the other hand, it was Pulaski's practice to allow student organizations to distribute literature during the lunch hour with prior approval. *See* Pet. App. B, at 18a.

Gernetzke's meeting with Pulaski regarding the distribution of materials was not discussed with the Bible Club; nor did the Bible Club designate Gernetzke as the

person to see Pulaski regarding the distribution of religious literature. Gernetzke stated she made the request for herself. *Id.* at 17a.

Petitioners also assert that the District enacted several policies that "attempt to regulate literature distribution in schools." Pet. at 3. This is also untrue. Respondents have always maintained (and the District Court agreed) that the District does not have a policy regulating literature distribution in its schools. Pet. App. B, at 30a. Rather, it was Pulaski's individual actions which were at issue in this case and, since this was an official capacity case, the issue presented below was whether those actions were attributable to the District under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

District Policy 5126.8 (the only allegedly offending policy alleged in Petitioners' Complaint) was enacted to regulate the mass distribution of informational materials to District students, such as take-home announcements and mailings, from outside groups or individuals. The District maintained, and the District Court agreed, the policy did not apply to Gernetzke's request. Pet. App. B, at 18a-19a, 29a.

Regardless, Policy 5126.8 requires that a copy of the proposed literature be screened by the Superintendent or his designee. The Superintendent's "designee" for purposes of applying this policy is the head of the District's Office of Special Projects, not Pulaski or any other principal. Even if 5126.8 had applied to her request (as Petitioners contend), Gernetzke failed to comply with its terms in that she never submitted a copy of the proposed literature to either the Superintendent or the Office of Special Projects (or Pulaski for that matter). Pet.

App. B, at 29a. In any event, Pulaski was not acting pursuant to this policy when he denied Gernetzke's literature distribution request, therefore, there was no "causal connection" between Policy 5126.8 and Pulaski's decision. Pet. App. B, at 30a.

Further, District Policies 2210, 2440, 6161.12,[1] 8515 and Document 402 (which speak for themselves) were not enacted nor do they "attempt" to regulate literature distribution in District schools.

Policy 2210 merely states that a principal is the chief administrative and instructional officer of his/her school. Pet. App. D, at 40a. This policy has nothing to do with literature distribution. Under Policy 2440, the Superintendent (or his designee) has authority to "use professional judgment" in situations where the District's School Board has not adopted any applicable policies or guidelines. Pet. App. D, at 42a. Policy 8515 merely gives the Superintendent the authority to formulate administrative rules "consistent with" Board policies and with Board approval. Pet. App. D, at 45a. Document 402 was adopted to administer Policy 5126.8 and regulate bulk materials though the school mail system. Pet. App. B, at 29a.

On their face, none of these policies attempted to regulate student literature distribution at District schools. Further, none of these policies regulated symbols, religious or otherwise, in District schools.

Petitioners also allege that Pulaski is the Superintendent's "designee" having authority to approve/disapprove student literature distribution

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[1] Petitioners conceded in oral argument before the District Court that Policy 6161.12 had no application in this case.

requests at Tremper. Pet. at 3. Pulaski is not the Superintendent's "designee" under Policy 5126.8. Pulaski is the Superintendent's designee regarding student literature distribution at Tremper under Policy 2440 which only gives him authority to use "professional judgment" where the school board has not adopted a written policy. Under this policy, Pulaski only had the discretion to make a "professional judgment" with regard to literature distribution on his campus.

Petitioners allege that Pulaski "believes that everything the school allows, it automatically endorses." Pet. at 4. Pulaski's actual statements were that he believed that the cross on the mural would "cross that line between church and state within the schoolhouse." He also stated that he sees the murals "as an expression of the school" and with or without a disclaimer sign, students and visitors "would not necessarily make the connection [between the sign and the mural]." He also stated his belief that the school endorses those "clubs" it allows to be on campus and, "generally speaking," believes that the school endorses the literature its clubs pass out.

Petitioners' Statement fails to mention that the Bible Club mural is very large (54 by 62 inches in size) and is located in a hallway of the school where "everybody travels." Students must pass the mural to get to the lunch rooms, commons and classes, gym and auditorium. All students must pass the mural at one time or another (and possibly two or three times) during the day. Pet. App. B, at 15a.

The Bible Club mural has been vandalized by graffiti on three occasions since completed. One defacement was a pentagram symbolizing witchcraft. During Pulaski's tenure at Tremper, the student body has included admitted Satanists and Neonaziists. Gernetzke conceded that Pulaski's concerns for Bible Club members' safety were "legitimate." Pet. App. B, at 16a.

Additionally, in April or May of 1999 (after the student shootings at Columbine High School) several students in trench coats approached Tremper's Activities Director, Damon Weiss. The students stated that since the Bible Club had put up the mural they would like to put up one with a swastika. Weiss concluded the students were "skinheads." Pet. App. B, at 16a-17a.

It is undisputed that Dr. Johnson did not participate in either the mural or literature distribution decisions alleged in the complaint.

## REASONS FOR DENYING THE WRIT

### I. ISSUES NUMBER 1-3 ARE NOT PROPERLY BEFORE THIS COURT

Three of the questions presented in the Petition were not raised in the Court of Appeals and, therefore, are not properly before this Court. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 67 L. Ed. 2d 287, 101 S. Ct. 1146 (1981). They are as follows:

1. Whether the requirements of a "custom, policy or practice" announced in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) applies to an action brought against a governmental official for prospective relief only?

This is a new theory advanced by Petitioners for the first time before this Court. The issue of whether Petitioners had alleged and proven a basis for government liability under *Monell* was squarely before both the District Court and Seventh Circuit. Petitioners failed to argue to either court that *Monell's* policy or custom requirement did *not* apply to their claims for prospective relief in accordance with the Ninth Circuit's holding in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989). In fact, they conceded below that *Monell* was the "defining case regarding suits against local government bodies" and argued that they had satisfied *Monell's* requirements for District liability. Petitioners never made any distinction between the various types of relief sought in the Complaint.

2. Whether, pursuant to 42 U.S.C. §1983, governmental entities may be held liable under a *respondeat superior* theory of liability for violations of constitutional and statutory rights when their employees make decisions the entity authorizes them to make?

This is also a new theory advanced by Petitioners for the first time before this Court. Petitioners never argued below that a *respondeat superior* theory of liability should attach in this case. Pet. at i. Petitioners also never argued that the District enacted policies whereby it consented to the imposition of *respondeat superior* liability. Pet. at 16. Contrarily, Petitioners agreed that *Monell* was the "defining case" for government liability and argued they had satisfied its "policy or custom" requirements. Having failed in their proof requirements below, Petitioners now argue for the first time that *Monell* must be readdressed to impose *respondeat superior* liability.

3. Whether the terms "order and discipline" found in Section 4071(f) of the Equal Access Act incorporate a "heckler's veto" into the Act and thereby allow school officials to censor a noncurriculum-related student club because other students may disagree with the message conveyed by the club?

The issues of whether the Equal Access Act authorized the District to maintain order and discipline, insure that attendance at meetings was voluntary and prohibit meetings that interfered with the orderly conduct of educational activities was squarely before the Seventh Circuit. Pulaski's concern that the Bible Club mural would cause disruption at the school was squarely before the Seventh Circuit.

There was never any argument raised that the cross on the mural must "materially and substantially interfere" with school discipline before Pulaski could exercise any discretion to prohibit the activity. More specifically, no argument was ever raised that under the Second Circuit's analysis in *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2nd Cir. 1996), religious club activity could be restricted only when it "materially and substantially" interfered with the requirements of appropriate discipline in the school.[2]

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[2] This omission is particularly difficult to reconcile since Petitioners' counsel filed an amicus curiae brief in the *Hsu* case and, therefore, was fully aware of its possible implications.

## II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE NINTH CIRCUIT'S HOLDING IN *CHALOUX*

In a transparent attempt to capture this Court's attention, Petitioners argue for the first time that the Seventh Circuit's ruling regarding their §1983 claims conflicts with the decision of the Ninth Circuit Court of Appeals in *Chaloux v. Killeen,* 886 F.2d 247 (9th Cir. 1989). Pet. at 6-11. Petitioners' reliance on *Chaloux* is misplaced and has not been properly preserved for Supreme Court review.

As a result of Petitioners' failure to argue that *Monell* was applicable only to their damage claims and *Chaloux* to their claims for prospective relief, the Seventh Circuit specifically noted that it need not "take sides" as to whether the predominant view of *Monell* applied. *Gernetzke v. Kenosha Unified Sch. Dist. No. 1,* 274 F.3d 464, 468 (7th Cir. 2001). Petitioners are foreclosed from now arguing otherwise to this Court.

Petitioners' argument is also moot or will shortly become moot before this case is considered by the Supreme Court. Sharon Gernetzke graduated from Tremper High School in June of 2000. Joseph Bezotte no longer attends Tremper and it is anticipated he will graduate from the District in June of 2002.

Graduation renders any claims for equitable relief moot. *Board of Sch. Comm'rs v. Jacobs,* 420 U.S. 128, 129, 43 L. Ed. 2d 74, 95 S. Ct. 848 (1975). *See also Cole v. Oroville Union High Sch. Dist.,* 228 F.3d 1092 (9th Cir. 2000). Further, the "capable of repetition, yet evading review" exception to mootness will not apply because neither of the students will be subject to Pulaski's practice nor any other District policy in the future and an award of

damages means any legal issues will not "evade review." *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 n.3, 125 L. Ed. 2d 1, 113 S. Ct. 2462, 2464 n.3 (1993)). Gernetzke's claims for prospective relief are moot and Bezotte's will be moot by the time this case is ready for Supreme Court review.

Petitioners' contention that the Seventh Circuit's decision conflicts with the Ninth Circuit is also without merit. The Petition noticeably fails to recognize that, unlike the facts presented in *Chaloux*, Petitioners' Complaint *does* allege a claim for damages. On its face, the stated issue as to whether *Monell* "applies to an action brought against a governmental official for prospective injunctive relief *only*" is inapplicable here. Pet. at i (emphasis added). The Seventh Circuit's decision is limited to the facts presented and is not, therefore, at odds with *Chaloux*.

In *Chaloux*, *Monell* did not apply because, unlike *Monell*, "*solely* a claim for prospective relief" was presented. 886 F.2d at 250 (emphasis added). That is not the case here. *See also Jordan by Jordan v. Jackson*, 15 F.3d 333, 338 n.2 (4th Cir. 1994) (*Chaloux* does not apply where complaint also seeks nominal damages).

Unlike *Chaloux*, the imposition of liability in the instant case does carry with it a "threat of fiscal liability." *Chaloux*, 886 F.2d at 251. To the extent that this Court seeks to decide the issue of whether *Monell* does not apply to a suit for prospective injunctive relief only, this is not the proper case. *See also Barrett v. Harwood*, 189 F.3d 297 (2nd Cir. 1999); *Greensboro Professional Fire Fighters Ass'n v. City of Greensboro*, 64 F.3d 962 (4th Cir. 1995); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994);

*Adkins v. Board of Educ.*, 982 F.2d 952 (6th Cir. 1993); and *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989) where *Monell* was also applied in cases involving both claims for damages and injunctive relief.

Another case cited by Petitioners, *Santiago v. Miles*, 774 F. Supp. 775, 792 (W.D.N.Y. 1991), is inapposite because it too involved a claim for prospective relief only, not damages. Pet. at 8. The same is true with respect to *Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 809-810 (N.D.Tex. 1991), *aff'd on other grounds*, 970 F.2d 82 (5th Cir. 1992) ("Monell does not apply . . . where Plaintiff seeks only prospective injunctive and declaratory relief against the City . . . and there is no threat of municipal financial liability.") and *Reynolds v. Giuliani*, 118 F. Supp. 2d 352 (S.D.N.Y. 2000) which are also cited by Petitioners. Pet. at 8. *But see Leary v. Daeschner*, 228 F.3d 729, 740 n.4 (6th Cir. 2000); *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 997 (11th Cir. 1990) and *United States v. Commonwealth of Pennsylvania*, 902 F. Supp. 565 (W.D.Pa. 1995), *aff'd*, 96 F.3d 1436 (3rd Cir. 1996), where *Monell's* policy or custom requirement applied in actions seeking only prospective injunctive relief.

Petitioners argue that the Ninth Circuit applied the *Chaloux* rule in *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469 (9th Cir. 1993) even though the plaintiff had "included additional claims for backpay and damages." Pet. at 8. That is not true. The only issue before the Ninth Circuit was whether the plaintiff was entitled to retrospective relief in the form of reinstatement and backpay. Such remedies, the court stated, *were* subject to *Monell's* policy or custom requirement. 995 F.2d at 1472. Although the court cited the *Chaloux* rule in dicta, it was factually inapplicable to the issues raised on appeal. *Id.* at 1472 n.1.

The Seventh Circuit's decision does not conflict with *Chaloux* and its progeny and is consistent with the Second, Fourth, Sixth and Eleventh Circuits. Even if there were a conflict (which there is not) Petitioners have waived it on appeal.

## III. THE SEVENTH CIRCUIT'S CONCLUSION THAT PETITIONERS HAD NOT PROVEN A CASE FOR DISTRICT LIABILITY UNDER §1983 IS CONSISTENT WITH SUPREME COURT PRECEDENT

As the Seventh Circuit aptly noted, had Petitioners named Johnson and Pulaski in their individual (as opposed to official) capacities, they would not be facing *Monell's* threshold requirements. Pet. App. A, at 4a. In choosing to sue Johnson and Pulaski in their official capacities only, Petitioners knowingly subjected themselves to the *Monell* requirement for government liability.

Petitioners' ill-conceived argument that the Seventh Circuit's decision "insulates" the District from liability and "abuses" the *Monell* doctrine is disingenuous. Pet. at 11. Petitioners' "nightmare," if any, is due to their own failure to allege and prove the threshold requirements for local government liability pursuant to Supreme Court precedent.[3]

The Seventh Circuit's holding was based upon and is consistent with *Monell* where the Supreme Court rejected

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[3] The District, in turn, would have been obligated to indemnify Johnson and Pulaski for any damages assessed against them in their individual capacities as a result of actions committed within the scope of their employment. §895.46(1)(a), Wis. Stats. Resp. App. 1.

the doctrine of *respondeat superior* liability and established the touchstone of a §1983 action against a governmental unit as an "allegation that official policy *is responsible for* a deprivation" of constitutional rights. *Monell*, 436 U.S. at 690 (emphasis added). Pet. App. A, at 5a-6a.

The Seventh Circuit, following Supreme Court precedent, held that there can be no governmental liability under §1983 unless it is proven that such a policy *caused* the alleged injuries. Pet. App. A, at 6a. *See City of Canton v. Harris*, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986); and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985).

Any other conclusion, this Court has stated, "would be inconsistent with the principles underlying §1983." *Pembaur*, 475 U.S. at 480. The Seventh Circuit appropriately stated:

> Respondeat superior . . . makes an employer liable even if faultless for the torts its employees commit in the course of their employment.

Pet. App. A, at 5a-6a.

Nevertheless, that is the exact conclusion sought by Petitioners. Petitioners seek to nullify twenty-four years of Supreme Court precedent rejecting *respondeat superior* principles to governmental liability under §1983:

> The grant of authority to use discretion, no matter how small a grant, should lead to liability for the school district . . .

Pet. at 15.

Petitioners' argument is factually and legally meritless. Other than citing to several legal articles and

dissenting opinions criticizing *Monell*, in general, Petitioners have cited no precedential authority favoring the imposition of *respondeat theory* of liability in this case. Petitioners' argument, in fact, conflicts with Supreme Court precedent. *See Pembaur*, 475 U.S. at 481-82 (authority to exercise discretion does not give rise to municipal liability) (citing *Tuttle*, 471 U.S. at 822-24). The plurality in *Praprotnik* stated:

> If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior liability.

485 U.S. at 126. *See also Radic v. Chicago Transit Auth.*, 73 F.3d 159, 161 (7th Cir. 1996).

Based on the overwhelming statutory and case law supporting the Seventh Circuit's decision, it is not surprising Petitioners have failed to cite a single case supporting their position that delegation of authority to use "professional judgment" "is akin to a consent by the School Board to a *respondeat superior* liability." Pet. at 16.

All employees, absent any policy addressing a specific situation, have implicit authority to use "professional judgment" while executing their job responsibilities. Such "authority" is not tantamount to official policy directing violations of the First Amendment.

The District does not consent to the imposition of *respondeat superior* liability under Policy 2440 by granting Dr. Johnson/his designees to "use professional judgment" in situations where there is no applicable District policy. Pet. App. D, at 42a. Contrarily, if Johnson or his designees exercise their professional judgment in an unconstitutional manner, this Court has stated that the District would not automatically be liable under §1983,

for liability would then rest on *respondeat superior*. *Canton*, 489 U.S. at 387.

Petitioners' attempts to minimize the broad-reaching effects of their argument by distinguishing the actions of Johnson and Pulaski from other employees or administrators is illogical. Pet. at 16. One can envision the struggle courts would face in determining who has discretionary "authority" to make a particular decision and who does not. Conceivably, many employees will have discretion to make the same decision. As the Seventh Circuit aptly stated:

> [Petitioners' argument] would collapse direct and derivative liability. Every public employee, including the policeman on the beat and the teacher in the public school, exercises authority ultimately delegated to him or her by their public employer's supreme governing organs. . . . for if a police department or a school district were liable for employees' actions that it authorized but did not direct, we would be back in the world of respondeat superior. . . . Delegation is not direction; authorization is not command; permission does not constitute the permittee the final policymaking authority.

Pet. App. A, at 7a-8a (citing *Praprotnik*, 485 U.S. at 126).

Petitioners do not argue that the Seventh Circuit erred in holding that Petitioners had failed to prove a "custom"[4] or "final policymaker"[5] theory of liability

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[4] Petitioners do not raise any "custom" theory of recovery before this Court other than to make the conclusory statement that Pulaski's "custom" had been in effect for eleven years. Pet. at 15. This Court has no obligation to consider an issue merely raised, but not developed. *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 697 (7th Cir. 1991). Such an argument would

under *Monell*, but contend that Policy 5126.8 provides the requisite causal nexus between Pulaski's literature distribution decision and the District. Pet. at 12. This argument was dismissed by both lower courts.[6]

Regardless, it is uncontroverted that Pulaski was not acting pursuant to this policy when he made this decision. In a sworn affidavit, Pulaski stated:

> I never told Sharon Gernetzke that District policy 5126.8 governed her request to distribute literature . . . The practice [of permitting school-recognized student organizations to distribute literature . . . during the lunch hour] . . . is not a

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nonetheless fail because there is no allegation in the Complaint or proof that Pulaski's actions were pursuant to any "widespread practice" which was "so permanent and well settled" as to constitute District custom with "the force of law." *See Monell*, 436 U.S. at 694. Petitioners never even alleged a "custom" theory of liability. *See Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998). Nor is there any proof of any knowledge or awareness of any such "custom" and its consequences by the school board. *Denno v. School Bd.*, 218 F.3d 1267, 1277 (11th Cir. 2000).

[5] Petitioners also do not raise a "final policymaker" theory of liability in the Petition other than to state, without any support, "The Superintendent and his or her designee (Principal Pulaski in this case) have been given final policymaking authority regarding the distribution of literature." Pet. at 13. Likewise, a "final policymaker" theory of liability would fail because it was never even pled. *See Baskin v. City of Des Plaines*, 138 F.3d 701, 705 (7th Cir. 1998). Whether a public employee has "final policymaking authority" is a question of state law. *Praprotnik*, 485 U.S. at 123. In Wisconsin, a public school district's "final policymaker" is its school board. *See* §§120.05, 120.13(1)(a)-(b) and 120.44, Wis. Stats. Resp. App. 2-8.

[6] Petitioners did not contest before the Seventh Circuit the District Court's finding that Policy 5126.8 did not apply to the cross on the mural request.

> District policy or custom, but my individual practice at Tremper. When I made the decision to deny Sharon Gernetzke's vague request to "massively" distribute literature, I was not acting pursuant to any District policy or custom. In my opinion, the District does not have a policy regarding student distribution of materials.

The District Court correctly determined Policy 5126.8 did not apply to Gernetzke's request; the District did not have a policy regulating student requests to distribute literature; Policy 5126.8 did not "cause" Petitioners' purported injuries and, undisputedly, Gernetzke did not comply with its terms. Pet. App. B, at 29a-31a. Further, Johnson stated that Document 402 relates to Policy 5126.8 and there is no proof that the District has ever administered Policy 5126.8 outside of Document 402. It is undisputed that there was no affirmative link between either of Pulaski's decisions and Policy 5126.8 or any other District policy. The Petition does not even raise any arguments regarding Pulaski's mural decision.

The Petition also makes some factual allegations that are not supported by the record and mislead this Court. For example, Petitioners allege Johnson "was fully aware" of Pulaski's "longstanding practice of the school" and he "agreed" with the decision and gave his "full approval."[7] Pet. at 12, 14, 15. This is untrue. Johnson

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[7] Petitioners do not explain why these allegations, notwithstanding their inaccuracies, are relevant to this Court's consideration. In the event it is an attempt to raise a "ratification" theory of liability, such a theory (as the lower courts properly held) would also fail because Johnson was not a "final policymaker" within the meaning of *Pembaur*. Petitioners also never alleged that any District official with final

knew nothing of Dr. Pulaski's literature distribution practice (or his decision regarding Gernetzke's request) until *after* he was named as a defendant in this lawsuit. There were no conversations between the two on this issue until *after* the lawsuit was filed.

Further, Johnson's testimony, taken after the fact and within the context of this lawsuit, merely provides: " . . . in terms of supporting the decision, it has to be in a greater context. But on its face, I support Bud Pulaski." There is nothing in the record supporting Petitioners' contention that Pulaski's decision regarding Gernetzke's request was "with the full approval of the Superintendent." Pet. at 15.

Further, Johnson did not state Policy 5126.8 applies to situations where students bring in literature from the outside. Pet. at 12. Contrarily, he said no one could understand that Policy 5126.8 applied to students on campus. Johnson's statement is taken out of context. He merely "guessed" that it "could apply" to a student wanting to distribute literature from outside the campus "associated with a school activity" or representing the "same league."

Policy 5126.8 was intended to regulate the mass distribution of information materials to District students, such as take-home announcements and mailings, from outside groups or individuals. Pet. App. B, at 19a. There is no evidence in the record that Policy 5126.8 has ever been applied to a student request to distribute literature

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policymaking authority approved the principal's decision and the basis for it. *Baskin*, 138 F.3d at 701. Nor is there any proof that the school board had any knowledge of and approved Pulaski's actions.

on a school campus or that Policy 5126.8 has been applied to anything other than requests from "outside" groups or individuals seeking access to District schools. Further, Policy 5126.8 does not contain the individual vs. student organization distinction which was employed by Pulaski. Nor does it contain any reference to "religious" materials.

Petitioners also misrepresent that Pulaski was Johnson's designee to administer Policy 5126.8. Pet. at 13. In fact, the Superintendent's "designee" for purposes of applying this policy was the head of the District's Office of Special Projects, not Pulaski or any other principal.

Even if Policy 5126.8 applied to her request (which it did not), it is undisputed that Gernetzke failed to comply with the policy's requirements. She did not submit a copy of the proposed literature to either the Superintendent or the Office of Special Projects (or Pulaski for that matter). Pet. App. B, at 29a. Further, Pulaski stated he was not acting pursuant to this policy (or any other policy) when he denied Gernetzke's literature distribution request. Therefore, there was no "causal connection" between this policy and Pulaski's decision. Pet. App. B, at 30a.

The only designated authority Pulaski had to approve or disapprove literature distribution at Tremper was under Policy 2440, which provides that the Superintendent (or his designee) has authority to "use professional judgment" in situations where the District's School Board has not adopted any applicable policies or guidelines. Pet. App. D, at 42a. Under such policy, Pulaski had only the authority to use "professional judgment." There is nothing in this policy which precludes religious symbols or literature.

The Seventh Circuit whittled through Petitioners' ill-defined theories and reached a well-reasoned and well-supported decision based on the facts presented in this particular case. Obviously dissatisfied with the outcome of this case, the Petition seeks to create a controversy where there is none. Petitioners simply failed to allege and demonstrate any affirmative link for District liability under *Monell*. This case does not present any compelling reason for Supreme Court review.

## IV. THE SEVENTH CIRCUIT'S APPLICATION OF §4071(f) OF THE EQUAL ACCESS ACT IS CONSISTENT WITH THE LANGUAGE AND INTENT OF THE STATUTE AND SUPREME COURT PRECEDENT

Petitioners contend that the Seventh Circuit incorporated a "heckler's veto" into the Equal Access Act which conflicts with the Second Circuit Court of Appeals' decision in *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2nd Cir. 1996). Pet. at 22. This is incorrect. The Seventh Circuit did not incorporate a "heckler's veto" into 20 U.S.C. §4071(f).

The Seventh Circuit held there was no proof of discrimination against the Bible Club (thereby affirming the District Court's grant of summary judgment to the District). Nonetheless, the court stated, Pulaski's decision was insulated from liability under the "order and discipline" defense in 20 U.S.C. §4071(f) which *"suggests"* that the principle in the heckler's veto cases "has not been carried over into the Equal Access Act." Pet. App. A, at 3a (emphasis added). The court did not make the definitive finding advanced by Petitioners in this regard.

Neither was the Seventh Circuit's comment outcome determinative. Initially, the court held that the Act was not violated by the refusal to place a cross on the Bible Club mural because the Bible Club was permitted to hold meetings on school grounds, announce its meetings and otherwise compete on equal terms with other nonreligious student groups. Pet. App. A, at 3a.[8] Further, in refusing the naming of a brand of beer on the S.A.D.D. mural, Pulaski showed he was prohibiting displays which he "reasonably believed likely to lead to litigation or disorder." *Id.*

Regardless, the Seventh Circuit's decision is consistent with *Mergens* where this Court stated that, although the Act limited a schools' authority to discriminate against students, " . . . we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate." *Board of Educ. v. Mergens*, 496 U.S. 226, 240, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988) and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)).

This Court compared the "material and substantial" interference standards in §4071(c)(4) to *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 21 L. Ed. 2d

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[8] Without stating as much, the Seventh Circuit appears to give its tacit approval to the District Court's holding that the cross on the mural was not activity protected by the Act.

731, 89 S. Ct. 733 (1969)[9], but not to the "order and discipline" defense articulated in §4071(f). *Mergens*, 496 U.S. at 241.

Petitioners' reliance on *Hsu* is misplaced as the facts there involved a denial to officially form an after school religious club unless Christians and non-Christians alike were able to become officers in the club. The application of subpart (f) was not even before the court. Further, the Congressional record cited in *Hsu*[10] does *not* "make it clear" that the Act adopted the "materially and substantially" limitations in *Tinker* into §4071(f). *Hsu*, 85 F.3d at 867-68, n.28.

Consistent with the Seventh Circuit's decision, the *Hsu* court made it clear that *Tinker* "limits student freedom more sharply than the parties concede" and Congressional supporters of the Act did not intend it "to open the school doors to hate groups, cults, and *proselytizers*." *Hsu*, 85 F.3d at 867-68 (emphasis added). Further, the court cautioned, "Courts must be extremely reluctant to overrule the judgment of local administrators who are responsible for making these sensitive decisions." *Id.* at 873.

The Seventh Circuit also followed Supreme Court precedent when it acknowledged that the First Amendment has been "sensibly interpreted" to allow

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[9] The "heckler's veto" was recently modified by this Court in the context of a student religious activity case in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119, 150 L. Ed. 2d 151, 121 S. Ct. 2093 (2001) (" . . . a group's religious activity can be proscribed on the basis of what the youngest members of the audience might perceive.")

[10] The relevant Congressional record citations in *Hsu* include 130 Cong. Rec. 19,228; 19,232; 19,244; and 20,941.

school authorities greater control over the free speech of students than the state could exercise over adults engaged in political discussion in the non-school setting. Pet. App. A, at 3a-4a (citing *Hazelwood*, 484 U.S. at 266). In this regard, the Seventh Circuit stated, "Order and discipline are part of any high school's basic educational mission; without them, there is no education." Pet. App. A, at 4a.

The Seventh Circuit's decision is consistent with Supreme Court decisions in holding that a "school need not tolerate student speech that is inconsistent with its 'basic educational mission' . . . even though the government could not censor similar speech outside the school." Pet. App. A, at 4a (quoting *Hazelwood*). The Seventh Circuit also acknowledged *Hsu* in support of the proposition that the First Amendment has a broader scope than the Equal Access Act. *Id.*

This case is also fundamentally different than *Tinker* in that the permanent placement of a large, Christian cross on a public high school wall is not purely private speech (as were the armbands in *Tinker*). Distinguishably, the prominent placement of the cross would cause reasonable belief that Christianity bears the imprimatur of the District.

Further, it would impinge on the rights of others, including students, not to be the subject of religious coercion. As this Court aptly stated in *Hazelwood*:

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in Tinker – is different from the question whether the First Amendment requires a school affirmatively to promote particular speech.

484 U.S. at 270-71.

In the latter case (as is present here), "[e]ducators are entitled to exercise greater control" to assure that the "views of the individual speaker are not erroneously attributed to the school." *Id.* at 271. The school also retains the authority to refuse to sponsor student speech that might "reasonably be perceived to advocate drug or alcohol use" or "associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272. Thus, the standard advanced by Petitioners from *Tinker* is not the same standard for "determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Id.* at 272-73.

Section 4071(c)(4) provides that the Act will be complied with if "the meeting does not materially and substantially interfere with orderly conduct of educational activities within the school." This same language is not found in §4071(f).

Section 4071(f), when read within the context of the entire statute, is unambiguous and the Seventh Circuit correctly declined to apply the "material and substantial" requirements articulated in *Tinker* to this subpart. When considering subpart (f), Congressional supporters made it clear that discretion as to whether the acts of an organization would be disruptive to the purpose of a school would remain within the realm of school administrators. This holds true even if the organization is only going to engage in discussion and not any form of physical disruption. 130 Cong. Rec. 19,224 (statement of Sen. Hatfield). Further, the Act was intended to assure the rights of students to gather for religious purposes "so long as they do not infringe on the rights" of others. *Id.* at 19,228 (statement of Sen. Danforth).

The theory underlying subpart (f) was to make it clear that school administrators would have "inherent power to prevent the unrestrained, intensive, extreme psychological pressure which could be utilized by some religious groups to attempt to bring other kids within the religious community." *Id.* at 19,229 (statement of Sen. Danforth).

However, that is exactly the result sought by Petitioners. Their purported protected "expression" is to permanently affix a large, Christian symbol on a public high school wall which every student in the school (Christians and non-Christians alike) will have to pass several times each day. Petitioners cite to no cases holding that §4071(f) applies "only when they [the religious clubs] materially and substantially interfere" with appropriate discipline in the school. Pet. at 23.

The issue of whether Petitioners' First Amendment rights were violated was not before the Seventh Circuit nor is it before this Court. This is not a First Amendment claim, but an Equal Access Act claim. Petitioners ignore the difference.

In this case, Pulaski had reason to anticipate that a large, permanent, Christian symbol on a wall that every student would pass several times each day *would* "substantially interfere" with the work of the school or impinge upon the rights of others. This is not a case about student armbands (*Tinker*), but is more akin to *Hazelwood* where this Court made it clear that student expressions that might "reasonably perceive to bear the imprimatur of the school" is not limited to the standard articulated in *Tinker*. *Hazelwood*, 484 U.S. at 271. The Seventh Circuit's opinion is also consistent with *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 150 L. Ed. 2d 151, 121 S. Ct. 2093

(2001), where this Court applied a modified "heckler's veto" and held that "a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." 533 U.S. at 119.

While Pulaski has been principal at Tremper, students have included admitted Satanists and Neonaziists. The school has active white supremacists and there have been racial incidents. Pulaski "reasonably believed" that the large Christian cross would "bear the imprimatur" of District approval of the Christian religion. He was concerned that the cross would lead to litigation, cause disruption at Tremper and threaten the safety of Bible Club members. Gernetzke conceded Pulaski's concerns for Bible Club members' safety were "legitimate." Even without the cross, the Bible Club mural has been defaced on three occasions and prompted neo-nazi students to contemplate painting a mural with a swastika.

This is the exact scenario Congress intended to protect and expressly defer to the discretion of school administrators under §4071(f) as to whether the acts of an organization would be disruptive to a school.

## V. THE LOWER COURTS' INTERPRETATION OF THE EQUAL ACCESS ACT IS CONSISTENT WITH SUPREME COURT PRECEDENT

Petitioners claim the Seventh Circuit's affirmation of the District Court is in conflict with the Supreme Court's decision in *Mergens*. Conversely, the lower courts' holdings are consistent with *Mergens* and the plain meaning of the statute.

*Mergens* involved the denial of a request to officially form a Christian student club. *See also Ceniceros v. Board of Trustees*, 106 F.3d 878 (9th Cir. 1997); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3rd Cir. 1993); and *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D.Cal. 2000). That is not the case here.

Unlike *Mergens*, it is undisputed in this case that the Bible Club *was* an officially recognized student club at Tremper and had utilized Tremper's facilities (including the public address system and bulletin boards) for more than eleven years. In fact, the District has a specific policy (1330.1) that authorizes noncurriculum-related student groups, like the Bible Club, to utilize District facilities for their meetings. Resp. App. 9. Thus, Petitioners' claim that the Bible Club was not granted "equal access" to student group "activities" rings hollow.

The District Court did not define the term "meeting" in the Act to only apply "in a spatial sense." Pet. at 28. That is purely Petitioners' terminology. Considering that "meetings" guaranteed by the Act must be "voluntary" and that under §4071(f) schools retain the right to maintain order and discipline, protect student and faculty well-being and "assure that attendance of students at meetings is voluntary," the District Court held:

> . . . the court is not persuaded that allowing members of a student club to paint a Christian cross in a school thoroughfare that students must traverse daily is *voluntary "meeting"* contemplated by the Act.

Pet. App. B, at 34a (emphasis added).

The Petition noticeably avoids any reference to the "voluntary" nature of "meetings" protected by the Act. In *Mergens*, this Court made clear that the Act's limitation of meetings to "noninstructional time" avoided the problem

of mandatory attendance which had previously been struck down by the Court. *Id.* at 251 (citing *Edwards v. Aguillard*, 482 U.S. 578, 584, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)). Further, the recognized purpose underlying the Act was to end "discrimination by allowing students to meet and discuss religion before and after classes" and was not intended to "endorse or disapprove of religion." *Id.* at 245, 249 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)).

Consistent with the lower courts' holdings, this Court has held that the pursuit of religious freedom does not trump the Establishment Clause under which government cannot "coerce anyone to support or participate in religion or its exercise . . . " *Lee v. Weisman*, 505 U.S. 577, 587, 599, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (citations omitted). *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000) (school sponsorship of a religious message is impermissible); *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (posting of Ten Commandments on public school wall violated Establishment Clause under three-prong test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)); and *School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963) (recitation of Lord's Prayer violated Establishment Clause).

Regardless of whether the cross is on a Bible Club mural, the message to an objective observer would be that Christianity has the District's stamp of approval. Unlike *Mergens*, the permanent display of a cross on a public school wall would have violated the Establishment Clause pursuant to the three-prong analysis in *Lemon*. *See, e.g., Joki v. Board of Educ.*, 745 F. Supp. 823, 829

(N.D.N.Y. 1990) (permanent painting of crucifixion in public high school auditorium had the primary effect of endorsing Christianity).

The Act itself prohibits school "sponsorship" of any religious meetings, §4071(c)(2), meaning "school officials may not promote, lead, or participate in any such meeting, §4072(2)." *Mergens*, 496 U.S. at 253. Meetings are also limited to "noninstructional time" and student attendance must be "voluntary and student-initiated." §4071(b) and (c)(1). Further, schools cannot "require any person to participate in prayer or other religious activity" or "abridge the constitutional rights of any person." §4071(d)(2) and (7).

Petitioners do not seek merely access to the same activities as other school clubs, they seek to use such activities to promote and proselytize their Christian message in a coercive, involuntary manner to a captive audience of students. This is not the type of student activity envisioned by this Court in *Mergens*, but is the type of religious coercion the drafters of the Act sought to avoid.

During congressional debate, concern was raised that groups would seek to use the schools to proselytize for their particular religious beliefs and "claim the right to use school facilities to market, merchandise, and proselytize in connection with their own thoughts." 130 Cong. Rec. 19,227 (statement of Sen. Metzenbaum). This concern was minimized by the "voluntary" nature of the activities which were required to occur during non-school hours. *Id.* at 19,239 (statement of Sen. Durenberger). The "voluntariness" of the protected religious activity was emphasized:

> . . . it is extremely important to reemphasize the voluntary aspects of this amendment. There can be no requirement that a student participate in a group which is involved in prayer or other form of religious activity.

*Id.* at 19,245 (statement of Sen. Dole).

Inconsistent with the plain language of the statute and Supreme Court precedent, Petitioners seek broad application of the Act to hold an "involuntary" meeting which is not limited to non-instructional hours and requires a captive audience to "participate in such activity." The lower courts correctly held, consistent with the statute and *Mergens*, that the cross was not protected activity under the Act.

## CONCLUSION

For the reasons set forth herein, Petitioners have not articulated any compelling reason to justify discretionary review by this court and Respondents Michael Johnson, Chester Pulaski and Kenosha Unified School District No. 1 respectfully request that this Court deny petitioners' Petition for Writ of Certiorari to review the Judgment and Opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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**Wis. Stats. 895.46 State and political subdivisions thereof to pay judgments taken against officers. (1)** (a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment. The duty of a governmental unit to provide or pay for the provision of legal representation does not apply to the extent that applicable insurance provides that representation. If the employing state agency or the attorney general denies that the state officer, employee or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit. Failure by the officer or employee to give notice to his or her department head of an action or special proceeding

commenced against the defendant officer or employee as soon as reasonably possible is a bar to recovery by the officer or employee from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employee legal counsel and the offer is refused by the defendant officer or employee. If the officer, employee or agent of the state refuses to cooperate in the defense of the litigation, the officer, employee or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

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**Wis. Stats. 120.44 School board powers and duties. (1)** A unified school district is a body corporate with the power to sue and be sued, to levy and collect taxes, to acquire, hold and dispose of property and to do all other things reasonable for the performance of its functions in operating a system of public education.

**(2)** The public schools of a unified school district shall be under the management, control and supervision of a school board. The school board shall have the powers and duties of the school board and annual meeting in a common school district. The officers of a unified school district have the powers and duties of the officers of a common school district. No annual meeting shall be held in a unified school district. The school board shall not, in

the name of the school district, issue bonds or incur other indebtedness without approval of the electors of the school district in any instance where the school board of a common school district is not authorized to do so.

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**Wis. Stats. 120.05 School board officials. (1)** (a) The members of a school board shall be the officers of a school district.

(b) In the case of a 3-member school board, the school district president, treasurer and clerk shall constitute the school board. At the first election of a 3-member school board, the clerk shall be elected for a one-year term, the treasurer for a 2-year term and the president for a 3-year term.

(c) In the case of a school board with more than 3 members, the school board shall annually elect a school district president, vice president, treasurer and clerk from among its members at a school board meeting held on or within 30 days after the 4th Monday in April.

(d) A school district officer shall be a resident of the school district in which the officer serves. A school district officer who represents an apportioned area pursuant to a plan adopted under s. 120.02(2) shall be a resident of the apportioned area for which he or she is elected or appointed at the time the officer takes the oath of office. If a school district officer who represents an apportioned area ceases to be a resident of that area after beginning his or her term but continues to be a resident of the school district, the officer may continue to serve for

the balance of the term for which he or she was elected or appointed.

(2) If the territory of a common school district and a union high school district is identical, the school board of common school district shall constitute the school board of the union high school district.

(3) If the school district president, vice president, treasurer or clerk of any school board is unable to discharge the duties of the office due to disability or absence, the school board may appoint a person to discharge the duties of such a person until the disability or absence no longer exists. In the case of a 3-member school board the appointee shall be an elector of the school district. In the case of a larger school board the appointee for the president shall be the vice president and the appointee for the other officers shall be another school board member. The school board shall determine the compensation of such appointees. A person acting as school district clerk or school district treasurer shall have the powers of a deputy and shall take and file an official bond covering the person's acts unless the bond of such officer includes a bond for the officer's deputy. This subsection does not apply to vacancies caused by absence from the school district for a period exceeding 60 days covered by s. 17.03(4).

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**Wis. Stats. 120.13 School board powers.** The school board of a common or union high school district may do all things reasonable to promote the cause of education,

including establishing, providing and improving school district programs, functions and activities for the benefit of pupils, and including all of the following:

**(1) SCHOOL GOVERNMENT RULES; SUSPENSION; EXPULSION.** (a) Make rules for the organization, gradation and government of the schools of the school district, including rules pertaining to conduct and dress of pupils in order to maintain good decorum and a favorable academic atmosphere, which shall take effect when approved by a majority of the school board and filed with the school district clerk. Subject to 20 USC 1415(k), the school board shall adopt a code to govern pupils' classroom conduct beginning in the 1999-2000 school year. The code shall be developed in consultation with a committee of school district residents that consists of parents, pupils, members of the school board, school administrators, teachers, pupil services professionals and other residents of the school district who are appointed to the committee by the school board. The code of classroom conduct may provide different standards of conduct for different schools and may provide additional placement options under s. 118.164(3). The code shall include all of the following:

1. A specification of what constitutes dangerous, disruptive or unruly behavior or behavior that interferes with the ability of the teacher to teach effectively under s. 118.164(2).

2. Any grounds in addition to those under subd. 1. for the removal of a pupil from the class under s. 118.164(2).

3. The procedures for determining the appropriate educational placement of a pupil who has been removed from the class and assigned a placement by the school principal or his or her designee under s. 118.164.

4. A procedure for notifying the parent or guardian of a minor pupil who has been removed from the class under s. 118.164(2).

(b) 1. In addition to rule-making authority granted school boards under par. (a), the school district administrator, or any principal or teacher designated by the school district administrator, may make rules with the consent of the school board.

2. The school district administrator or any principal or teacher designated by the school district administrator may suspend a pupil for not more than 5 school days or, if a notice of expulsion hearing has been sent under par. (c)4. or (e)4. or s. 119.25(2)(c), for not more than a total of 15 consecutive school days for any of the following reasons:

a. Noncompliance with rules adopted under subd. 1. or school board rules.

b. Knowingly conveying any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives.

c. Conduct by the pupil while at school or while under the supervision of a school authority that endangers the property, health or safety of others.

d. Conduct while not at school or while not under the supervision of a school authority that endangers the

property, health or safety of others at school or under the supervision of a school authority or endangers the property, health or safety of any employee or school board member of the school district in which the pupil is enrolled.

2m. In subdivision 2. c. and d., conduct that endangers a person or property includes making a threat to the health or safety of a person or making a threat to damage property.

3. Prior to any suspension, the pupil shall be advised of the reason for the proposed suspension. The pupil may be suspended if it is determined that the pupil is guilty of noncompliance with a school board rule or a rule adopted under subd. 1., or of the conduct charged, and that the pupil's suspension is reasonably justified. The parent or guardian of a suspended minor pupil shall be given prompt notice of the suspension and the reason for the suspension.

4. The suspended pupil or the pupil's parent or guardian may, within 5 school days following the commencement of the suspension, have a conference with the school district administrator or his or her designee who shall be someone other than a principal, administrator or teacher in the suspended pupil's school. If the school district administrator or his or her designee finds that the pupil was suspended unfairly or unjustly, or that the suspension was inappropriate, given the nature of the alleged offense, or that the pupil suffered undue consequences or penalties as a result of the suspension, reference to the suspension on the pupil's school record shall be expunged. The administrator, or

the administrator's designee, shall make a finding within 15 days of the conference.

5. A pupil suspended under this paragraph shall not be denied the opportunity to take any quarterly, semester or grading period examinations or to complete course work missed during the suspension period, as provided in the attendance policy established under s. 118.16(4)(a).

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1330.1

## CLASSIFICATION OF GROUPS USING SCHOOL DISTRICT FACILITIES OR GROUNDS AND RULES APPLICABLE TO EACH GROUP (Amended 5/28/91)

### Policy

Permitted uses, availability and fees (where applicable) shall be determined by classification.

The School Board shall create and maintain a document entitled "Classifications of Groups Using School District Facilities." This document shall contain the names of all groups which have been granted use of District facilities and a copy of this document shall be provided to the Director of Facilities Services. Each group listed on this document shall be categorized under one of the seven (7) classifications set forth below. The School Board shall meet once a year to update this document.

In the event a group not classified on the document requests use of District facilities or grounds, a temporary determination regarding classification shall be made by the Director of Facilities Services pending Board review. Such group shall remain under the classification assigned by the Director of Facilities Services until the Board meets for its annual review of the document at which time the Board shall make the final determination regarding classification.

### Rule

Classification of groups using school District facilities shall be as follows:

1. School Activity Groups

School Activity Groups are those groups which are related directly to an educational program or extra-curricular programs sponsored by the school, including athletic, cultural, and social group activities.

School Activity Groups will be permitted to use District facilities or grounds for any purpose which is related directly to an educational program or extra-curricular program sponsored by the school.

School Activity Groups will be permitted to use District facilities or grounds during non-school hours with special permission of the school principal.

School Activity Groups will be provided use of District facilities and grounds free of charge.

2. School-Related Activity Groups

School-Related Activity Groups are those groups not under direct sponsorship of the school but related to the schools, and include parent-teacher groups, 4-H groups, Scouts, parent booster groups, and any such groups as may be approved by School Board action for inclusion in this category.

School-Related Activity Groups will be permitted to use school District facilities or grounds for any purpose which directly or indirectly promotes the education, health, welfare, and personal growth of the District's students.

School-Related Activity Groups shall be allowed use of District facilities or grounds when such use does not interfere with the use of the facilities or grounds by School Activity Groups.

School-Related Activity Groups will be provided use of District facilities and grounds free of charge during normal custodial working hours. Activities after these hours may be assessed the actual custodial costs.

3. Non-curriculum Related Student Group

Non-curriculum Related Student Groups are those groups that meet for purposes unrelated to the body of courses offered by the school. A group is a Non-curriculum Related Student Group if the following conditions are true:

a. The subject matter of the group is not actually taught nor will be taught in the future in a regularly offered course of the school.

b. The subject matter of the group does not concern the body of courses as a whole.

c. Participation in the group is not required for a particular course.

d. Participation in the group does not result in academic credit.

Non-curriculum Related Student Groups will be permitted to use District facilities and grounds for any purpose which does not materially and substantially interfere with the orderly conduct of educational activities within the school. Furthermore, Non-curriculum Related Student Group meetings may not be directed, controlled, conducted, or regularly attended by non-school persons. Non-curriculum Related Student Group meetings must be voluntary and student initiated and may not be sponsored by the school, the government, or its agents or employees. Although a school employee, such as a teacher, may not promote, lead or participate in the

meetings, a teacher, administrator, or other school employee may be assigned to the meeting for supervisory purposes. The school District will not deny equal access or a fair opportunity to, or discriminate against, any Non-curriculum Related Student Group who wishes to conduct a meeting on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Non-curriculum Related Student Groups shall be allowed use of District facilities or grounds during normal custodial hours and during non-instructional times (i.e. time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends).

Non-curriculum Related Student Groups will be provided use of District facilities and grounds free of charge.

4. Classification – Citizen Associations

Citizen Associations are those associations organized in a non-partisan, non-sectarian, non-exclusive association for either of the following purposes:

a. The discussion of public questions, or

b. The promotion of public health by instruction in physical culture and hygiene or physical exercises.

Citizen Associations will be permitted use of District facilities or grounds for the discussion of public questions or for the promotion of public health by instruction in physical culture and hygiene or by physical exercises. All such gatherings shall be free to the public.

Citizen Associations will be permitted use of District facilities and grounds when those facilities or grounds are not being used for their prime purpose. Because the prime purpose of school property use is to promote the education, health, welfare, and personal growth of the students, Citizen Associations will not be permitted use of District facilities or grounds when those facilities or grounds are being used for the school's instructional purposes or by either School Activity Groups or School-Related Activity Groups.

The school District shall provide Citizen Associations free of charge any necessary light, heat and custodial service, and make such other provisions as are necessary for the free and convenient use of the District facilities and grounds at such times as the Citizen Association designates.

5. Recreation Department Sponsored Groups

Recreation Department Sponsored Groups are those groups which meet the stablished [sic] criteria for obtaining services and receiving Board approval for sponsorship in support of services by the Recreation Department.

Recreation Department Sponsored Groups may use the District facilities or grounds for any lawful purpose which promotes the recreation and physical fitness of the District's residents and students.

Recreation Department Sponsored Groups may use facilities and grounds during non-instructional hours and when such use does not interfere with use for school purposes or school related functions.

The use of District facilities and grounds by Recreation Department Sponsored Groups shall be Board subsidized through the Recreation Department budget. Property fees shall be waived and custodial costs shall be paid through the Recreation Department's budget.

When the group sponsored by the Recreation Department is a cooperative program, property fees shall be waived, except that organizations that have their own facilities and/or charge a participation fee will be assessed one-half of the established fee for use of the District facilities or grounds. Cooperative programs will also be assessed custodial costs.

6. Other Individuals

Other Individuals are those individuals who intend to use District facilities or grounds for lawful non-school purposes.

Other Individuals may be permitted use of District facilities or grounds for any lawful non-school purpose provided that such use is not contrary to the policies of the School Board or rules set forth in 1330 or inconsistent with the promotion of the education, health, welfare, and personal growth of the District's students as determined by the Director of Facilities Services.

Other Individuals may be permitted use of District facilities or grounds when such use does not interfere with use for school purposes or school related functions. Accordingly,

Other Individuals will always be denied access to District facilities and grounds where such facilities or grounds are reserved for use by School Activity Groups or School-Related Activity Groups. Furthermore, because the school

District is statutorily required under Section 120.12(1), Stats., to make District facilities and grounds available to Citizen Associations at such times as the association designates, Other Individuals will also be denied access to District facilities or grounds where such facilities or grounds are reserved for use by Citizen Associations.

Other Individuals may be charged a fee, not to exceed actual costs, as determined by the School Board.

7. Religious Organizations

Religious Organizations are those organizations formed for the primary purpose of promoting a devotion to a religious faith and/or an organized system of faith and worship.

Religious Organizations may use District facilities or grounds for any lawful non-school purpose provided that such use is not contrary to the rules set forth in 1330 or inconsistent with promotion of the education, health, welfare, and personal growth of the District's students as determined by the Director of Facilities Services.

Religious Organizations are permitted use of District facilities and grounds when such use does not interfere with use for school purposes or school related functions. Accordingly, Religious Organizations will be denied access to school facilities and grounds only when such facilities or grounds are reserved for use by School Activity Groups or School-Related Activity Groups. Furthermore, because the school District is statutorily required under Section 120.12(1), Stats., to make District facilities and grounds available to Citizen Associations at such times as

the association designates, Religious Organizations will also be denied access to District facilities and grounds when such facilities or grounds are reserved for the use by Citizen Associations.

In accordance with Section 120.13(17), Stats., Religious Organizations, other than Non-curriculum Related Student Groups, shall be charged a reasonable fee, not to exceed actual costs, as determined by the School Board, for use of District facilities and grounds.